

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

ORIGINAL

77-7009

United States Court of Appeals

FOR THE SECOND CIRCUIT

WILLIAM R. VAN GEMERT, *et al.*,
Plaintiffs-Appellants,
against

THE BOEING COMPANY,
Defendant-Respondent.

On Appeal from the United States District Court for the
Southern District of New York

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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DOCKET NO.
77-7009

On Appeal from the United States District Court
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PLAINTIFFS-APPELLANTS' REPLY BRIEF

CORRECTING CERTAIN MISSTATEMENTS OF "FACT"
IN DEFENDANT'S BRIEF

Defendant has created unwarranted confusion by unfairly charging to all of the plaintiffs certain erroneous statements which it well knows were not made by all of the plaintiffs - specifically, not made by us. We feel that this confusion should be dispelled at the outset.

1. At p. 22 defendant says that "plaintiffs claim" that the action is "for conversion". We have never

claimed that this is an action for conversion and we have no idea which property of plaintiffs defendant might have converted. Nevertheless, defendant purports to support this charge with a page reference to our brief - along with such references to the other briefs. Reference to the page will show that we said no such thing. We have said, time after time, in words identical with or similar to those at p. 15 of our main brief here:

"The damages awarded here are for breach of contract to deliver shares which are readily available on the New York and other Stock Exchanges."

2. Defendant says (at p. 1) that this action was brought in the federal courts "pursuant to" federal statutes. Defendant knows full well that paragraph 1 of the consolidated complaint reads in part:

"The jurisdiction of this court also rests upon diversity of citizenship." (A 3).

We have pointed out many times that, for example, our client Dennis J. Finn resides in Florida; his damages, as awarded by Judge Ryan, exceed \$42,600; Boeing is a citizen of Delaware.

3. Defendant accuses "plaintiffs" no fewer than five times of charging Judge Ryan with an "abuse of discretion" on the matter of prejudgment interest (pp. 5, 6,

9, 19-20). At p. 9 defendant again, by giving page references to all of plaintiffs' briefs, including ours, represents to this Court that the page references support the accusation. They do not. The truth is that WE have never said or implied that Judge Ryan's decision on the interest question was an "abuse". Judge Ryan exercised "judicial discretion". McClintock on Equity (Second Edition, 1930) at p. 49. In our opinion his holding was wrong because interest is mandatory. We also feel that if discretion were permissible there would have been reversible error in its exercise. But error is not abuse. Our position is succinctly set forth in McClintock, supra, at p. 51:

"Equitable discretion in this sense is distinguished from the discretion which a common-law, as well as an equity, trial judge has to make certain rulings on procedural questions which cannot be reviewed unless the discretion has been abused. Equitable discretion is subject to review on appeal, since it is the duty of the reviewing court to render the decree which the trial court ought to have rendered."

REPLYING TO BOEING'S POINT I - PREJUDGMENT INTEREST

A. This Court Held that a Promise to Give Reasonable Notice Was Implied

The present Boeing argument is that this Court "reformed" the contract between Boeing and plaintiffs, that reformation is an action of an equitable nature and,

therefore, this case falls within the exclusion of C.P.L.R. 5001(a). To support the argument, Boeing says: 1) this Court created or discovered a "new duty" the imposition of which amounted to a "reformation" of the contract and 2) this Court, in a footnote, suggested the possibility of an "equitable remedy" by payment in stock.

This Court's holding, we respectfully submit, was that there was an implied promise to give adequate notice of a call and on Boeing's failure to perform that promise it had no right to refuse tenders of debentures for conversion. Enforcing an implied promise does not reform the contract; it carries it out.

Under the section title of "Breach of Implied Promises" 11 Williston on Contracts Third Edition (1968) Sec. 1295 reads at p. 37:

"Since the governing principle in the formation of contracts is the justifiable assumption by one party of a certain intention on the part of the other, the undertaking of each promisor in a contract must include any promises which a reasonable person in the position of the promisee would be justified in understanding were included."

The language of this Court (A 110-1) closely parallels the above:

"What one buys when purchasing a convertible debenture in addition to the debt obligation of the company incurred thereby

is principally the expectation that the stock will increase sufficiently in value that the conversion right will make the debenture worth more than the debt. The debenture holder relies on the opportunity to make a proper conversion on due notice. *** The debenture holder's expectancy is that he will receive reasonable notice and it is his reliance on this expectancy that the courts will protect."

And (A107):

"The duty of reasonable notice arises out of the contract."

At p. 41 of 11 Williston, op. cit., the author quotes:

"Though a court balks at making a contract for the parties, it will, where justice and expediency demand, infuse the contract with a spirit of good faith and fair dealing in order to justify the implication of a covenant which will prevent one party from impairing the right of the other party to receive the fruits of the contract."

Implied promises, when broken, are compensated for by damages. The contract is not reformed. 11 Williston, op. cit., at p. 33 reads:

"It is not only for breach of express promises that a contractor is liable but for breach of implied promises as well."

We turn, then, to the footnote suggestion of payment in stock. What this Court said was (A 111-2):

"On the remand for a determination of damages" (underscoring ours)

the District Court might consider the appropriateness of payment in stock

"the shares being valued according to their market value at date of issuance. (Underscoring ours).

The direction was to fix damages in dollars and the suggestion was to consider whether under the law of New York the judgment might provide for an alternative form of payment at dollars' worth and whether, if so, that would be appropriate. While the suggestion is, we believe, novel it does not change the form of the action into one of "an equitable nature". The damages are not given in lieu of equitable relief; the action is not for specific performance; it is, as we stated above, for damages for nondelivery of stock which is available in millions of shares on the Stock Exchanges. The footnote does not change the nature of the action.*

*Boeing has not asked for the privilege of paying in stock and the thought was not considered below. The Court may be interested in the practical significance of the suggestion. We estimate damages under the New York rule and interest thereon for eleven years to approximate \$5,500,000. The equivalent with the stock at 40, is 137,500 shares. On the money side, at September 30, 1976 Boeing had cash and short-term investments of \$370,035,000; total current assets of \$1,200,799,000; net current assets of \$656,609,000. On the stock side, Boeing had 40,000,000 shares authorized and 21,688,888 shares issued, including 466,408 in the Treasury.

B. Reformation Relates to Matter which the parties
Had Intended to Put into Writing

While, in most instances, defendant claims only that this Court "in effect reformed that instrument" (p. 16) and "in effect reformed the Indenture (p. 24) it goes so far, at one point, as to say that "thus this Court exercised its equitable powers by reforming that instrument" (p. 16).

Reformation is not something "in effect". It changes the writing. 13 Williston on Contracts Third Edition (1970) at p. 132 reads:

§1549. Reformation Can Only Make a Writing Express What Parties Intended Should Be Written. The province of reformation is to make a writing express the bargain which the parties desired to put in writing. Agreements of which they did not desire written expression will not be put into writing by decree of the court."

This Court did not say that the parties had intended - i.e. Boeing had intended - to say that it would give adequate notice. It said that from the writing this promise would be implied because plaintiffs would expect such notice.

To read a contract in an equitable way is not to reform it. It is to affirm it.

C. The Sabre Case Is No Authority for Equity

The Sabre case cited by Boeing (at p. 15) is far afield. The question was one of equitable distribution of assets in bankruptcy. The bankruptcy court is a court of equity and Erie has no application to distribution of assets in bankruptcy.

Heiser v. Woodruff 327 U.S. 726, 90 L.ed. 970 (1946) at p. 732.

D. If Fairness Were the Test Plaintiffs Would Be Entitled to Interest

We need not repeat what we said in our main brief as to fairness and justice if there were room for discretion. After March 29, 1966, Boeing refused to convert and after April 8, 1966 Boeing also refused to pay interest on the debentures. Not only did it hold up plaintiffs' shares and consequently the dividends on them but it refused to pay interest on the money which had been advanced to it in 1958.

Any suggestion that the litigation was protracted by plaintiffs is without foundation not only in the record but in fact. During that time defendant was gathering in the bonds, slowly but surely, in the belief that, in that way, it was benefiting by the delay.

Certainly, plaintiffs get no profit by retrieving interest either on what they lent to Boeing in 1958 or on the value of the shares of which they were deprived and which they were unable to sell or hold for income.

Boeing, meantime paid no interest on the borrowed money and its other shareholders had whatever benefit derived from the greater per share value attributable to the smaller number of outstanding shares.

REPLYING TO BOEING'S POINT II - THE NEW YORK
RULE OF DAMAGES

A. Boeing's Position is that the New York Rule
Does Not Apply in Equity

Boeing does not question the accuracy of our description of the New York rule. Prior to Baker v. Drake 53 NY 211, 13 Am. R. 507 (1873) the measure of damages for breach of a contract to deliver securities or commodities of a fluctuating value was the highest price between the date of the wrong and the date of trial. Baker v. Drake changed that to the highest price between the date of the wrong and a reasonable time after notice to the injured party. The Courts of New York regard this as "a just indemnity for the wrong". Baker v. Drake, p. 213.

Boeing's complex argument boils down 1) to reiteration of the premise that the relief here was in reformation and 2) to statement of a conclusion that a New York court, in an action for reformation, would not follow the New York rule. It assumes that this Court will do what the New York court would do.

Thus, the question which Boeing presents is: what would a New York court do when awarding damages in a reformation action?

B. A New York Court, in Equity, Would Apply the New York Rule

We need not say that it is solely for the purpose of argument that we assume that the action, in New York, would be regarded as one in equity for reformation. As we showed above in Point 1, the premise that the action or the relief is in reformation is itself unsound.

But if, as Boeing says, this Court "merely implied a 'duty of reasonable notice'" (p. 16) and "did not hold that Boeing had breached the Indenture but rather that the wrong to the Plaintiffs was its failure to give notice in excess of that provided by the Indenture" (p. 25) and if that makes the case one for reformation, what reason is there to believe that the New York courts would

select the date of breach rather than the rule which Boeing recognizes as the New York rule at law?

The very reason New York courts made their rule is that they regarded it as equitable, one which gives "a just indemnity". Baker v. Drake, p. 213. Other courts, including the Supreme Court have adopted it for the same reason.

Galigher v. Jones 129 U.S. 193, 32
L.ed 658 (1889)

11 Williston on Contracts Third
Edition (1968) Sec. 1384

There is no authority offered for the proposition that in New York, if the action were for equitable relief and damages were awarded in lieu thereof that the court would follow any different rule of damages. And the federal courts must, under Erie, do what the state courts would do. (our main brief, pp. 5-9).

The maxim is that equity follows the law. The exception to that maxim is where equity believes application of the law is "unconscionable".

Graf v. Hope Building Corp. 254 NY 1,
171 NE 884 (1930) both majority
and minority opinions

To support its position that New York equity courts would not apply the rule, Boeing employs epithets

which are presumably directed to unconscionability.

Boeing says that the "highest price date" is "theoretical" (pp. 21, 23). Since the price on the Exchange is not a matter of theory, we assume that Boeing means that it is "theoretical" that the price on April 14 accurately measures plaintiffs' damages. It is, however, no less "theoretical" that plaintiffs' damages were accurately measured by the price on March 29 - a date on which, by hypothesis, plaintiffs were unaware of the wrong and unable to mitigate their damages. It is because the law must choose what is fairest that the New York rule exists and one day is no more theoretical than the other; the New York rule is believed to be more just than "the breach date".

Boeing says that the "highest price date" is "punitive" (pp. 16, 26). The New York Court of Appeals adopted the rule because it thought its old rule was punitive and that its present rule was best devised to reach "a just indemnity".

Boeing says the New York rule is "arbitrary" (pp. 16, 26). Why a reasonable period is more arbitrary than one day when applied to securities of fluctuating value is not made clear. Again, the New York courts believe that

the New York rule is a fairer approximation of the loss suffered by the injured party where prices fluctuate.

Boeing says (pp. 23, 26) that the New York rule gives plaintiffs a "windfall". That begs the question. If the rule is one of just compensation then its application does not create a windfall. Plaintiffs recover under a rule of law which the courts believe to be just.

Finally, it is said that the April 14 price gives plaintiffs a preference over those who did convert (pp. 21-2, 26). How? The man who received his shares on (or as of) March 29 might have sold them immediately. He probably did not but his opportunity was an advantage, not a disadvantage. On the other hand he might have held them until the stock was split 2 for 1 and the split shares sold at 112-3/8 (or 224-3/4 for the original shares). Plaintiffs had no opportunity to sell their shares at that price. They are claiming 182, not the 224-3/4 which the converting holder might have obtained. Boeing's explanation of how plaintiffs are preferred (footnote p. 22) is that the stock was higher on April 14 than on March 29. But it was also higher for those who converted and who were in a position to sell their stock. Where the preference is we cannot see.

We find no persuasive reason to believe that a New York court, sitting in an action of an equitable nature, would not follow the rule at law. In fact, there is every reason to believe that the New York courts would think that by doing so they were following an equitable rule.

CONCLUSION

We respectfully submit that the judgment should be increased to \$4,026,762.25 with interest and costs in accordance with the law of the State of New York.

Respectfully submitted,

NATHAN, MANNHEIMER, ASCHE,
WINER & FRIEDMAN

Attorneys for Plaintiffs

NORMAN WINER
Of Counsel.

United States Court of Appeals for the Second Circuit

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AFFIDAVIT
OF SERVICE

STATE OF NEW YORK,
COUNTY OF New York , ss:
Afrim Haskaj

being duly sworn,

deposes and says that he is over the age of 18 years and resides at
1481 42nd St. Brooklyn NY

That on the 22nd day of February 19 77 at XX
he served the annexed 122 East 42nd St., New York, NY
Reply Brief upon

Kass, Goodkind, Wechsler & Gerstein
in this action, by delivering to and leaving with said attorneys
two true copies thereof.

DEPONENT FURTHER SAYS, that he knew the persons so served as aforesaid to be the
person mentioned and described in the said action

Deponent is not a party to the action.

Sworn to before me, this 22nd
day of February 19 77 }

Afrim Haskaj

Roland W. Johnson
ROLAND W. JOHNSON
Notary Public, State of New York
No. 470766
Qualified in Delaware County
Commission Expires March 30, 1977

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**AFFIDAVIT
OF SERVICE**

STATE OF NEW YORK,

COUNTY OF **New York**, ss:

Afrim Haskaj

being duly sworn,

deposes and says that he is over the age of 18 years and resides at

1481 82nd Street, Brooklyn, N.Y.

That on the 22nd day of February 1977 at
One Chase Manhattan Plaza, New York, N.Y.
he served the annexed Reply Brief upon

Davis, Polk & Wardwell Attorneys for Respondent
in this action, by delivering to and leaving with said
Davis Polk & Wardwell

two true copies thereof.

DEPONENT FURTHER SAYS, that he knew the persons so served as aforesaid to be the
person mentioned and described in the said action

Deponent is not a party to the action.

Sworn to before me, this 22nd

day of February 19 77

Afrim Haskaj

Roland W. Johnson

ROLAND W. JOHNSON
Notary Public, State of New York
Qualified in New York County
Commission Expires 12/31/78

services of ~~one~~ ^{two} copies of
the within Reply Brief is
heroby admitted this 22^d day
of February, 1977

Irving Steinman

~~Attorney for~~

Member of Plaintiff's Committee
of Attorneys